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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 551

PAUL GINSBURG, Petitioner,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND APPENDIX.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Paul Ginsburg, respectfully prays that a writ of certiorari issue in the above captioned case directed to the United States Court of Appeals for the Ninth Circuit to review its judgments (none of which was accompanied by an Opinion) in appeal No. 16,768, the one dated and entered April 11, 1960 (App. 5), denying your petitioner's Motion to Open Up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District for Trial; and the other dated and entered May 9, 1960 (App. 6), granting a Motion to Dismiss the Appeal.

OPINIONS BELOW

In the United States District Court for the District of Arizona at No. Civ.—2664 Phoenix, District Judge Dave W. Ling failed to deliver any Opinions and that Court's Judgment, entered June 19, 1959, is not reported

In the United States Court of Appeals for the Ninth Circuit in appeal no. 16,768 only one Opinion was entered, February 10, 1960, in support of that Court's denial of appellees' first Motion to Dismiss the Appeal (App. 1), which is not sought to be reviewed; and that Opinion is reported in 276 F. 2d 94. The judgments of that Court sought to be reviewed herein (App. 5 and 6) were not accompanied by Opinions and are not reported.

JURISDICTION

The judgments sought to be reviewed were dated and entered April 11, 1960 (App. 5) and dated and entered May 9, 1960 (App. 6). The timely Petition for Rehearing was denied on June 29, 1960. On September 19th, 1960, Mr. Justice Douglas entered an Order extending the time for filing this petition for writ of certiorari to and including November 26, 1960.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C., section 1254 (1); and the general supervisory power of this Court over lower Federal Courts.

QUESTIONS PRESENTED

1. Does not a District Court Order transferring a cause (over objection) pursuant to motion under 28 U.S.C., sec. 1404 (a), conflict with the law of the instant Circuit and other Circuits as well as with applicable

decisions of this Court, when it transfers an *in rem* interpleader proceeding wherein the interpleaded fund had been paid into the registry of the transferor Court and it transfers the cause to a district where the action could not have been brought; leaving the transferee Court no legal alternative but to retransfer and remand the cause to the transferor Court?

2. When it develops at the trial in the transferee Court that the Order of transfer was procured through fraud does it not become the duty of that Court to adjudicate the fraud and declare the Order of transfer void and all proceedings subsequent thereto a nullity, and *a fortiori* retransfer and remand the cause to the transferor Court on the theory that the transferor Court never lost jurisdiction and the transferee Court never acquired jurisdiction; and does not the transferee Court's failure and refusal to do so enter a conflict with the law of the Circuits and applicable decisions of this Court?

3. When the decedent-insured had made his brother the absolute owner, sole beneficiary, premium payer and possessor of policies of insurance on his life, can the decedent-insured's ex-wife establish an alleged oral trust for their two children "at the time" when said brother became the absolute owner, sole beneficiary, premium payer and possessor of the policies in writing on the forms supplied by the insurer for that purpose and at the office of the insured; and does not an adjudication awarding such a fund without a scintilla of evidence to support it, enter a conflict with the law of the Circuits as well as applicable decisions of this Court, and also deprive the owner of the policies of important

rights under the Constitution and laws of the United States?

4. In interpleader proceedings, even in legitimate cases, does not the successful litigant recover only the interpleaded fund; and does not a Court Judgment charging the unsuccessful litigant with fees and interest from the date of the interpleader enter a conflict with the law of the Circuits and applicable decisions of this Court?

5. When the record in the Court of Appeals fully supports appellant's Motion to Open Up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District for Trial, does not the Order denying said motion conflict with the law of the instant and other Circuits as well as with applicable decisions of this Court?

6. When a Motion to Dismiss a wholly meritorious appeal is based upon false representations that the appellant has not perfected his appeal pursuant to the Federal Rules of Civil Procedure, which misrepresentations are refuted by the record, does not an Order granting such motion to dismiss conflict with the law of the instant and other Circuits as well as applicable decisions of this Court?

STATEMENT OF THE CASE

On June 16, 1953, The Mutual Life Insurance Company of New York brought this interpleader proceeding in the United States District Court for the Western District of Pennsylvania at Civil Action No. 11,521, by the filing of a Complaint. Pursuant thereto the proceeds of two policies of insurance on the life of Samuel A. Gins-

burg, brother of petitioner, were paid into the registry of that Court. The said insured had died on April 7, 1953.

On November 26, 1952, the decedent-insured admittedly, formally and irrevocably made your petitioner the absolute owner, sole beneficiary, premium payer and possessor of two life insurance policies. On that day the decedent-insured accompanied by your petitioner took the policies to the Phoenix, Arizona, office of the insurer where said Samuel A. Ginsburg duly executed the insurance company's forms for that purpose and your petitioner paid the premiums then in the grace period. In due course the policies, together with the executed forms, were forwarded to the Home Office of The Mutual Life Insurance Company of New York to effectuate the endorsements, and thereupon the policies so endorsed were sent to your petitioner at his residence — Carlton House, Pittsburgh, Pennsylvania.

The face value of said policies was $30,000.00, but there were loans against the cash value. When the policies were assigned to your petitioner, they had a nominal value. The amount of the interpleaded fund was $27,456.38.

On or about April 17, 1953, the Pittsburgh Agent of The Mutual Life Insurance Company of New York issued a receipt to your petitioner for the policies, being surrendered for payment. Subsequently, when the payment was not forthcoming, your petitioner learned that the ex-wife of the decedent-insured and her Phoenix divorce Attorney (Samuel Langerman, Esquire) had been communicating with the insurer, framing a claim that the proceeds should be paid to petitioner only as Trustee for the two minors.

Failing in her effort to procure a compromise or nuisance share of the policy proceeds from the insurer, and for the sole purpose of advancing a scheme so to do, suit was filed on May 1, 1953, in the United States District Court for the District of Arizona at Civ. No. 1882 Phoenix. Named as defendants therein were the insurer and your petitioner; and the claim was that your petitioner be declared a Trustee of the proceeds for the two minor sons under an alleged oral trust created "at the time" when your petitioner was made the absolute owner, sole beneficiary, premium payer and possessor of the policies in writing. *During the course of the interpleader proceedings, Mr. Anderson, the Phoenix agent of the insurer, swore in Depositions that "at the time" of the transaction there was no mention of any trust and that, if there were, he would have given the decedent-insured different forms to sign; that the only persons present were the insured, your petitioner, and himself; further that he gave the routine explanation that henceforth the insured could not exercise any rights in the policies, but only his brother, Paul, could, to which the insured (an attorney) replied that he knew it and that is the way he wanted it to be; and finally that the insured appeared to know exactly what he was doing.*

After the said suit was filed in Phoenix, your petitioner on May 11, 1953, sued The Mutual Life Insurance Company of New York for the proceeds under his contracts, in the United States District Court for the Southern District of New York at Civil Action No. 8533. Then the insurer threatened to interplead the fund.

Your petitioner expressed his vehement opposition to an interpleader or to any other such litigation; and requested the insurer to present a Motion to Dismiss

the Phoenix Complaint, explaining that said Court lacked jurisdiction over his person and the Complaint on its face failed to state a claim upon which relief could be granted against the insurer, but it refused so to move. Even after your petitioner offered to pay all fees and expenses in connection therewith, the insurer refused so to move. Incidentally, your petitioner's Motion to Dismiss said Phoenix Complaint was granted on March 31, 1958, because the Court "has no jurisdiction over his person".

Finally, to avert the interpleader, your petitioner notified the insurer that it was not authorized by the Judicial Code and otherwise would be unlawful, as both claimants wanted the fund paid to Paul Ginsburg. Your petitioner wanted the fund paid to him individually; and his adversary wanted it paid to him as a trustee. All that the insurer had to do, therefore, in order to avoid dual liability, was to issue its check to the order of Paul Ginsburg, individually and or as trustee. It is elementary that the insurer had no right or duty to go any farther, as to see to the administration of the "trust", *et cetera*.

The insurer, nevertheless, unjustifiably threatened to interplead the fund in Phoenix, if your petitioner would not consent to the proceedings being had in Pittsburgh; for the interpleading plaintiff, insurer, was determined to proceed with its erroneous representation that there were two claims adverse to it.

After the fund was paid into the registry of the Western Pennsylvania District Court, Loyal H. Gregg, Esquire, was appointed guardian ad litem for the two minors; and his first move was purportedly under 28

U. S. C., sec. 1404(a), for transfer to the Arizona District, over petitioner's objections. The court's Order that the cause should be transferred for the convenience of witnesses was repeatedly the subject of prohibition, mandamus and appeal in the Court of Appeals for the Third Circuit, but said Court would not grant a writ of prohibition, or a writ of mandamus, or an appeal (dismissing the appeal on motion for want of an appealable Order). The dismissal of the appeal on motion became the subject of a denied petition for writ of certiorari to the court of appeals for the Third Circuit at No. 929 October Term, 1955, and the proceedings and appendices therein are incorporated herein by reference.

The transfer of the cause was finally put into effect by an Order dated May 9, 1957, entered by Chief District Judge Wallace S. Gourley of the Western Pennsylvania District.

It should be pointed out that in said Pennsylvania proceedings the mother of the two minors, Betty K. Ginsburg, was named as a defendant by the insurer, but before the cause proceeded on the framed issue, she always appeared as Betty K. Hilsdorf because she married one Thomas J. Hilsdorf in June, 1953. By the time the cause came on to be heard in Phoenix, she had been divorced from Hilsdorf but testified as Betty K. Hilsdorf, although she carried on the litigation as Betty K. Ginsburg, guardian ad litem for the minors.

The "trial" in the Arizona District Court was set for the week of November 17, 1958, before Judge Dave W. Ling, the only Federal Judge in Phoenix. Your petitioner sought one continuance, in support of which he submitted a list of cases then pending in higher Courts

which required prompt attention by him not only in Pittsburgh, but also in Philadelphia, New York and Washington, D. C. Judge Ling, nevertheless, denied the Motion for Continuance on November 3, 1958. Your petitioner promptly retained the Phoenix law firm of Beer, Seaman & Polley to represent him. Hess Seaman, Esquire, requested a continuance in order to prepare for trial, and Judge Ling denied that. On November 17, 1958, said counsel argued your petitioner's Motion for Summary Judgment, which was denied from the Bench. Your petitioner then had no alternative but air travel cross-country to arrive at Phoenix for the trial the day of November 18, 1958 and the morning of November 19, 1958.

Your petitioner had been put to all of this tremendous expense, inconvenience and harassment because the interpleaded plaintiffs, through their guardians ad litem and attorneys, had represented in affidavits as well as in open court at Pittsburgh that they had three witnesses at Phoenix who could and would testify, in support of their alleged oral trust. (The guardians ad litem had made it a matter of record that the two minors knew nothing of the matter and would not be called to testify.) In order to obtain sympathetic consideration of transfer for the convenience of witnesses, they also represented that the interpleaded plaintiffs could not afford the cost and travel time to Pittsburgh.

Your petitioner knew that the representations about their financial condition were false and fraudulent, because their interests in Trust Funds at Pittsburgh alone exceed a quarter of a million dollars, *which was not denied at the trial*. What made that fraud all the more reprehensible was the fact that the chief perpetrator

of the fraud was their cousin, Attorney Eugene B. Strassburger, who is also a co-Trustee of those very Trust Funds at Pittsburgh.

Your petitioner knew too that their representations in affidavits and in open court that they had those three such witnesses (or any other witnesses) were false and fraudulent, but he obviously could not expose that fraud until they had been given an opportunity to testify and failed. During the trial the three named witnesses were in Phoenix, but they called only two; *and, incredible as it may seem, both testified against the interpleaded plaintiffs' Complaint.* All that they testified to was that the decedent-insured had told them that if anything should happen to him, his two children were well provided for, but did not say how; *and further that he had not made any mention whatever of life insurance policies.*

All of the testimony offered by the interpleaded-plaintiffs, respondents herein, was hearsay, incompetent, irrelevant, immaterial or false; but even if it were admissible, competent, relevant, material and true, it could not possibly have established the alleged oral trust "at the time" or at any time. All that your petitioner, the interpleaded defendant, had to do in order to prevail was rely upon his written contracts of insurance and the above mentioned Deposition of Emil O. Anderson in a Court of justice.

On June 18, 1959, Judge Ling entered an Order denying petitioner's Motion to Retransfer the Cause. On June 19, 1959, Judge Ling signed the insupportable and untenable Findings of Fact and Conclusions of Law submitted for his signature by the respondents and entered

them. The same day Judge Ling signed and entered the Judgment in favor of the respondents which they submitted. On September 21, 1959, Judge Ling entered an Order denying petitioner's timely Motion for New Trial; for Reconsideration of Motion to Retransfer the Cause for Lack of Jurisdiction; and to Vacate and Set Aside Findings, Conclusion, Order and Judgment.

Prior to the entry of Judge Ling's final Judgment, your petitioner moved to have the order of transfer vacated for fraud, and petitioned for such relief at Miscellaneous No. 2354 before Chief District Judge Gourley of the Western Pennsylvania District who refused, and in the Court of Appeals for the Third Circuit wherein mandamus was denied. That matter became the subject of a denied petition for writ of certiorari herein to the Court of Appeals for the Third Circuit at No. 663 October Term, 1959, and the proceedings and appendices therein are incorporated herein by reference.

In due course your petitioner had filed his Notice of Appeal, Bond for Costs on Appeal, and Designation of Contents of Record on Appeal, designating "the complete record and all the proceedings and evidence", fully complying with F.R.C.P. Rule 75. Then your petitioner duly perfected his Appeal in the Court of Appeals for the Ninth Circuit.

Prior to the time for docketing the appeal, the respondents presented a preliminary Motion to Dismiss Appeal because of an alleged faulty Notice of Appeal. On one week's Notice, your petitioner again traveled cross-country to Los Angeles to argue in opposition to that preposterous motion, which was denied (App. 4). Your petitioner argued that the same counsel (Moore &

Romley of Phoenix) had within the past few years persuaded the same Court (Ninth Circuit) to grant a similar Motion to Dismiss, thus entering a conflict with other Circuits; but that this Honorable Court had granted certiorari and reversed the Judgment of the Ninth Circuit (*State Farm Mutual Automobile Ins. Co. v. Palmer*, 350 U.S. 944, 1956), resolving the conflict. Even the Ninth Circuit, under such circumstances, could hardly have granted that motion to dismiss. The accompanying Opinion (App. 1-4) of the Ninth Circuit pretended to adjudicate the issue as though it had not been squarely raised and decided in the *State Farm* case, *supra*, not even citing that case; when all that the Court had to do to support its denial of that motion to dismiss was state that it had already been decided in the *State Farm* case.

That four-page Opinion of the Court of Appeals, which was unnecessary, accentuates the suspicion surrounding that Court's failure to enter any more Opinions in support of its subsequent Orders, all of which were erroneously adverse to your petitioner, and which were required. It is provided by the Canons of Judicial Ethics that supporting judicial opinions should accompany Orders of Court in order to keep them above suspicion.

Two subsequent Orders of the Court of Appeals, unsupported and insupportable, and sought to be reviewed herein, are the Order (App. 5) denying the Motion to Open Up and Vacate the District Court Orders Appealed From and to Retransfer and Remand the Cause to the Pennsylvania District for Trial; and the Order (App. 6) granting the respondents' second Motion to Dismiss the Appeal. Petitioner's timely Petition for Rehearing was denied. Hence this petition.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I. The Order of Court Transferring This Cause From The Pennsylvania District To The Arizona District Was Erroneous.

A. The pronouncements of this Honorable Court in *Hoffman, U. S. District Judge, v. Blaski, et al.*, C. A. 7th Cir., 363 U.S. 335, decided June 13, 1960, make it plain beyond question that this cause should not have been transferred to the Arizona District where it could not have been brought, because of that Court's lack of venue and personal jurisdiction over your petitioner, interpleaded defendant therein; and not even if your petitioner had consented, and waived venue and personal jurisdiction defenses.

The Phoenix Complaint of Civil Action No. 1882 Phoenix, which instigated this action, was dismissed on petitioner's motion March 31, 1958, because the Court "has no jurisdiction over his person".

Mr. Justice Whittaker, in affirming the Seventh Circuit decision at 260 F.2d 317, stated in the Opinion of the Court (343), that this Court agrees with the dissenting opinion of the Third Circuit in *Paramount Pictures, Inc., v. Rodney,* 186 F. 2d 111. Thus it is evident that the Third Circuit's sanctioning of the instant transfer entered a conflict with the correct Circuits and the Law of the Land.

Mr. Justice Stewart, concurring, has thus indicated the instant petition should be granted, in stating (345), "In any event, the conflict between the Circuits is now resolved, and what happened here will not happen again".

B. The instant case is an *in rem* proceeding, not subject to transfer under 1404(a).

In Pennsylvania, interpleader, where the money has been deposited in the registry of the Court, is a proceeding *in rem*. *Metropolitan Life Ins. Co. v. Schultz*, 21 Pa. D. & C. 687. Furthermore, the federal interpleader statute provides (28 U.S.C., sec. 1335) that the interpleader fund is ". . . there to abide the judgment of the Court"; and that (28 U.S.C., sec. 2361) "Such District Court shall hear and determine the case . . .".

II. The Order Of Court Transferring The Cause Is Void Because It Was Procured Through Fraud.

It is a matter of record that the cause was transferred to Arizona for the "convenience" of three supposed witnesses at Phoenix by reason of false representations that they could and would testify in support of the averments of the interpleaded plaintiffs' Complaint; and that sympathetic consideration of the Motion for transfer was procured through false statements about the financial condition of the said respondents. Thus a fraud was perpetrated upon the Court and upon your petitioner. It is elementary that the Order of transfer procured through fraud is void and all proceedings subsequent thereto are a nullity. It necessarily follows that the Pennsylvania District Court never lost jurisdiction and the Arizona District Court never acquired jurisdiction of the cause.

III. The Arizona District Court Erred In Not Retransferring The Cause To The Pennsylvania District, Especially After Discovery Of The Fraud.

A. After the interpleader action had been transferred to Phoenix and before the trial, the Arizona District Court entered an Order dismissing the Phoenix Complaint (which brought about the interpleader) because the Court "has no jurisdiction over his person", which made it *res adjudicata* that the action could not have been brought in Arizona.

B. During the course of the trial, it became evident that the Order of transfer had been procured through fraud, thus being void and rendering all proceedings subsequent thereto a nullity.

C. The illegal transfer of the cause deprived your petitioner of his right to defend the claim in a court of competent jurisdiction in the District where he resides.

In view of these points, the Order of the Arizona District Court entered June 18, 1959, denying petitioner's Motion to Retransfer the Cause, was erroneous.

IV. The Alleged Oral Trust Was Unprovable And Unproved And Thus The Arizona District Court Judgment Was Erroneous.

At the trial nothing was offered even to attempt to establish an oral trust or any of its terms *at the time* or *after the time*. Only loose conversation was offered (over objection) to create a false impression that the decedent-insured said that his two children were taken care of *before the time*, which was incompetent, irrele-

vant, immaterial, hearsay or untrue. But even if that testimony were competent, relevant, material, admissible and true, it could not possibly have established a trust.

A parol trust of personalty must be established by clear and convincing evidence, *as to its existence and all of its terms. Allen v. Withrow,* 110 U. S. 119; *Carillo v. Taylor,* 299 P. 2d 188, 81 Ariz., 14; *Muriello v. Hernandez,* 281 P. 2d 786, 79 Ariz., 1; *Stewart v. Schnepf,* 158 P. 2d 529, 62 Ariz., 440; *Costello v. Cunningham,* 147 P. 701, 16 Ariz., 447; 23 A.L.R. 1500, p. 1528; 20 Am. Jur., Evidence, sec. 1253; 32 C.J.S., Evidence, par. 1023. Furthermore, there is no evidence that your petitioner ever accepted any such alleged trust, either expressly or constructively.

All of the elements of a trust must be proved by a very high degree of proof; and if any of the elements is missing, that is fatal to the trust. 54 Am. Jur. Trusts, sec. 30. *Carillo v. Taylor, supra.*

Assuming *arguendo* that the respondents' testimony did (through some inconceivable elasticity of the law) establish a trust, then the supposed trust would positively have been revoked by the subsequent outright transfer to your petitioner. *The law on that point of revocation is elementary.*

Furthermore, an insurance policy must be interpreted by first looking to the language of the contract; and where the terms thereof, as here, are not contradictory, the parol evidence rule excludes testimony, as offered here, to vary or contradict the terms of the integrated writings such as petitioner's contracts of insurance.

It was utterly impossible, therefore, for the guardian ad litem to have established a trust created *at any time*. Nevertheless it was the erroneous judgment of District Judge Ling that the respondents herein "are the sole equitable owners of the proceeds of those certain insurance policies". Upon consideration of your petitioner's Objections, the learned District Judge should have entered the Findings of Fact, Conclusions of Law and Judgment requested on his behalf.

V. District Judge Ling Was Without Jurisdiction Or Right To Enter An Affirmative Judgment Against Petitioner.

The most that the learned Arizona District Judge could have awarded to the respondents was the interpleaded fund then in the registry of his Court. Nonetheless Judge Ling entered an affirmative judgment for them against your petitioner.

The fund originally paid into the registry of the Western Pennsylvania District Court was $27,456.38; and that is the amount of the Judgment against your petitioner "together with interest thereon at the rate of six per cent per annum from June 16, 1953 until paid, together with their costs herein incurred". The interest thereon already is substantially in excess of $12,000.00; and your petitioner is without information as to their costs. However, the Pennsylvania District Court, prior to transfer of the cause, awarded fees and costs from the interpleaded fund at Pittsburgh (another dangerous precedent): $1,000.00 to William H. Eckert, Esquire, counsel for the insurer, for interpleading it, and $1,500.00 to Loyal H. Gregg, Esquire, guardian ad litem,

said motion should have been granted as a matter of law, as it was apparent from the record that the alleged oral trust was unprovable. Full support for this proposition developed at the trial, wherein there was not even an attempt to establish an oral trust or any of its terms at or after the time of the absolute transfer of the policies to your petitioner, and only loose talk was offered about events before the time, which, even if true, was incompetent, irrelevant, immaterial and hearsay.

Furthermore, even if the testimony feebly offered were true, competent, relevant, material and admissible, and also were legally sufficient to establish an oral trust and all of its terms, such a trust would have been revoked by the subsequent assignments and outright transfer of the policies to your petitioner.

VIII. The Court of Appeals Erred In Dismissing The Appeal.

The Motion to Dismiss the appeal in its entirety is as follows:

"Appellees respectfully move that the appeal herein be dismissed based upon the fact that Appellant has not perfected his appeal by filing and serving a statement of the points upon which he intends to rely and a designation of the portions of the record material to the consideration of the appeal as required by Rules 75 (a) and 75(d) Federal Rules of Civil Procedure, and by Rule 17 of the Rules of Procedure of the United States Court of Appeals for the Ninth Circuit."

It is obvious from the record that said motion is a misrepresentation because the appeal was duly perfected in strict compliance with the applicable Federal Rules of

Civil Procedure, including Rule 75. The only somewhat accurate averment in the Motion to Dismiss concerns noncompliance with Court Rule 17 on prosecution of the appeal; but it is elementary that the Court is not bound by its own Rules. Futhermore, Rule 17 of that Court was then inapplicable due to the pendency of preliminary motions. It necessarily follows that the motion was entirely untenable and insupportable. Incidentally, the Motion to Dismiss failed to comply with Rule 15 of the Court of Appeals, and particularly because it was not supported by affidavits.

The Motion to Dismiss was predicated upon delay due to presentation, consideration and disposition of preliminary motions, most of which delay was occasioned by the respondents themselves, beginning with their first Motion to Dismiss dated November 19, 1959. That motion was denied on February 10, 1960 (App. 4). after which the respondents as appellees therein had their Appearance of Counsel entered February 18, 1960. *Accordingly, the first three months of litigating in the Court of Appeals was consumed by the respondents' insupportable, untenable, dilatory motion to dismiss.*

After the said delay of three months chargeable to the respondents for their first motion to dismiss, their second motion to dismiss was filed on April 7, 1960, only seven weeks later, at which time they charged your petitioner with all delay, failing to make any mention whatever of their first motion to dismiss and its concomitant delay of three months. Although your petitioner had proceeded with two preliminary motions during that brief period of seven weeks, nevertheless the respondents persuaded the Court of Appeals.

No authorities were submitted in support of their Motion to Dismiss the appeal. They simply cited three inapplicable cases, by reason of which their motion actually should have been denied. (*Beecher v. Smithson*, C. A. 9, 1953, 205 F. 2d 113; *Beecher v. Leavenworth State Bank*, C. A. 9, 1954, 214 F. 2d 114; *Hargraves v. Bowden*, C. A. 9, 1954, 217 F. 2d 839).

In opposition to the Motion to Dismiss the appeal, your petitioner submitted many applicable authorities which established beyond question the point that the motion should be denied.

The decision of the Ninth Circuit in *Maloney v. Hammond*, C.A. 9th, 1948, 171 F. 2d 225, citing *Pyramid Motor Corp. v. Ispass, et al.*, 67 S. Ct. 954 (1947), conflicts with its decision dismissing the instant appeal. In that case the Court observed (226-227) that, as in the instant case, "No one contends that the appeal is without merit . . ."; and held that dismissal on motion is not appropriate.

Your petitioner's contention is further supported by that Court's decision in *Johnson v. Wilson*, C. A. 9th, 1941, 118 F. 2d 557, wherein it denied a motion to dismiss the appeal, holding (588): "Since the record presents a strongly arguable claim of error and the delay is not shown to have prejudiced the appellee, we consider the appeal . . .". Cited therein was *Ainsworth v. Gill Co.*, 104 F. 2d 83, 3rd Cir., 1939, wherein the Court held (85): "The motion to dismiss the appeal is accordingly denied and the appellant is given leave nunc pro tunc to file the record on appeal in this Court . . .". Such holding should apply *a fortiori* in the instant case.

Assuming *arguendo* the tenability of the said motion to dismiss, that Court, had it not been for counsel's misrepresentations, would have followed its attitude as expressed in *Pacific Coast Marine Ass'n v. Coastwise Line*, C. A. 9th, 1948, 171 F. 2d 284, where it held, in denying a motion to dismiss, that the delay of a day after the time permitted by valid extension in docketing the record, is a matter *de minimis*.

See also *Mutual Benefit Ass'n., v. Snyder*, 109 F. 2d 469, C. A. 6th, 1940; *Phillips v. Insurance Co.*, 239 F. 2d 79, 5th Cir., 1956; *Stumpf v. Matthews*, 195 F. 2d 25, C.A.D.C., 1951. Really applicable herein are the principles authoritatively set forth in 5 C.J.S. 441: An appeal will not be dismissed for want of prosecution where the record discloses want of jurisdiction in the court below; where both appellant and appellee were equally the cause of delay; where the record has been perfected and the appeal can be disposed of on the merits; and where the ends of justice would be defeated thereby.

IX. The Judgments Sought To Be Reviewed Conflict With The Law Of The Various Circuits And With Applicable Decisions Of This Court.

No authorities need to be cited to prove this point. The judgments are so clearly erroneous that they even conflict with the law of the Circuit wherein they were rendered. The learned Judges of the lower Courts were indeed laboring under a misapprehension of the Federal Rules of Civil Procedure, the law applicable thereto, and the constitutional guarantees of due process of law, when they handed down the decisions hereinabove set forth.

X. This Is A Case Of National Importance.

The judgments sought to be reviewed herein will be reversed. Otherwise the law of the Circuit Courts and that of this Court would soon receive the same "scrap of paper" treatment of trusts, estates and insurance policies, as was done in the instant case.

This Honorable Court has repeatedly declared that it is charged with supervisory powers and functions through which it hastens to set aside judgments that are void for fraud, "to see that the waters of justice are not polluted".

In the case of *Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra*, Mr. Justice Black, who delivered the Opinion of the Court, discussing the issue of the fraud perpetrated therein, stated (246), "This matter does not concern only private parties. . . . Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society".

CONCLUSION

There are many impelling reasons why the instant cause should be reviewed,—the conflicts, the fraud, the public importance. The conflicts should be resolved. The fraud should be cleansed. The public should be protected.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL GINSBURG,
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL GINSBURG, Appellant,

v.

BONN KRAUS GINSBURG and JOHN PAUL GINSBURG, Minors, by their Guardian Ad Litem, BETTY K. GINSBURG, Appellees

No. 16,768
Feb. 10, 1960

On Motion to Dismiss an Appeal from the United States District Court for the District of Arizona

Opinion

Before: STEPHENS, BARNES and KOELSCH, Circuit Judges

KOELSCH, Circuit Judge:

Appellees move to dismiss this appeal on the ground that "appellant has not filed a notice of appeal from a final decision of the district court."

Briefly, the record reveals that the Mutual Life Insurance Company of New York commenced an interpleader action in the District Court of the United States for the Western District of Pennsylvania to require appellees and appellant to litigate their respective claims to the proceeds of several policies of life insurance. After depositing the proceeds with the court the company was discharged. An issue was then framed between the adverse claimant, appellees as plaintiffs and appellant as defendant. On motion of appellees, resisted by the appellant, the suit was then transferred to the United States District Court for the District of Arizona where trial to the Court was held. After the Court had announced that judgment would be entered for appellees, appellant moved to re-transfer the cause, and this motion was denied. On June 19, 1959, Findings of Fact

and Conclusions of Law were filed and judgment favorable to appellees was entered. This judgment was based upon a single claim jointly asserted by the appellees and rendered jointly in their favor for the entire sum claimed; appellant recovered nothing.

On June 27, 1959, appellant filed a "Motion for New Trial; for Reconsideration of Motion to Retransfer the cause for lack of Jurisdiction; and to Vacate and set aside Findings, Conclusions, Order and Judgment." This motion was denied in its entirety by a minute order of the Court made September 21, 1959, and on October 20, 1959, appellant filed a notice of appeal which in its entirety reads as follows:

> Notice is hereby given that Paul Ginsburg, the above named Interpleaded Defendant hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of Court entered in this action on the 21st day of September, 1959.

Appellees contend in substance that since by the plain provisions of 28 U.S.C. § 1291 this court is only vested with jurisdiction to consider appeals from "final decisions" of district courts, and since appellant in the above notice is appealing only from an order denying motions for a new trial, to re-transfer the cause and to set aside judgment, the appeal must be dismissed because none of such orders constitutes a final decision from which an appeal will lie.

However, though it is true that none of the orders referred to in the notice of appeal before us constitutes a final decision, we nevertheless believe that appellees' motion to dismiss is not well taken for the reason that appellant's notice of October 20, 1959, is in fact a notice of appeal from the judgment of June 19, 1959.

Rule 73, so far as pertinent here, provides that "(a)—A party may appeal from a judgment by filing with the district court a notice of appeal—" and "(b) The notice of appeal shall specify the parties taking the appeal; shall designate the judgment or part thereof appealed from; and shall name the court to which the appeal it taken—." As already indicated, appellant was a party to the suit. He filed a notice of appeal in the district court; the notice specified that it was he who was taking this appeal and that the appeal was being taken to this court. However, the notice did not designate that the appeal was from a final decision in the case but rather (by reference) designated the appeal to be from the order denying his motion for new trial, to set aside the judgment and to re-transfer.

When the notice of appeal was filed there was a final decision— the judgment entered June 19, 1959.

The language of the notice we believe is such as to leave us two alternatives: first, we can perfunctorily accept the literal statement therein that the appeal is from the order denying the motion for new trial and to set aside the judgment; this approach will lead to the inevitable conclusion that the appeal must be dismissed; or, secondly, we can look to the nature of these two motions and consider the effect that either, if granted, would have had on the judgment, and from this infer that appellant by his notice of appeal actually intended to and in fact was attacking the judgment itself.[1] This

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1. It should be noted that there can be no uncertainty as to the particular judgment referred to in the notice of appeal since as already pointed out the judgment of June 19, 1959, in favor of appellees jointly was the only judgment entered.

latter approach appeals to us as more compatible with the spirit of the statutory admonition contained in 28 U.S.C. § 211 that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties", than would a policy of adherence to a strict construction of Rule 73(b).[2] Hoiness v. United States, 335 U.S. 297 (1953); United States v. Arizona, 206 F.2d 160, 161-2 (9th Cir., 1953), (Pope, J. dissenting), rev'd, 346 U.S. 907 (1953); Nolan v. Bailey 254 F.2d 638 (7th Cir., 1958).

In sum, to employ the language used by the Court of Appeals of the Fifth Circuit in Atlantic Coast Line R. Co. v. Mims, 199 F.2d 582, 583 (1952): "[w]hile we agree with appellees that an appeal from an order overruling a motion for new trial will not lie, we agree with appellant that though the order appealed from was misnamed it clearly enough appears from the record as a whole that the intent was to appeal from the judgment and that the intent should be given effect."

The motion to dismiss appeal is denied.

(Endorsed) Opinion filed Feb. 10, 1960.

FRANK H. SCHMID, Clerk.

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2. Rule 61 might also be mentioned. This rule likewise announces the doctrine of harmless error. As Prof Moore says in his work on Federal Practice: "Technically Rule 61 is only a mandate to the district court since the Supreme Court was only given authority for the base line courts. But there is no doubt that the Court's view on harmless error, as expressed in the Rule are gladly followed by the courts of appeals as expressive of the best practice." 7 Moore, Federal Practice § 61.11, at 1030 (2 ed. 1953).

Order Submitting Motion to Vacate and Motion to Dismiss, etc.

The motions of the respective parties coming on for hearing or submission, and there being no appearance in open court on behalf of either party, ORDERED (1). motion of appellant to open up and vacate the order of the District Court appealed from, etc., and (2). motion of appellees to dismiss the appeal submitted to the court for consideration and decision.

On consideration thereof, IT IS FURTHER ORDERED that (1). the motion to dismiss the appeal be, and hereby is continued for hearing to May 9, 1960, and (2). that the motion of appellant to open up and vacate the District Court orders appealed from, and to retransfer and remand the cause to the Pennsylvania District for trial be, and hereby is denied.

Filed and entered: April 11, 1960.

Order Dismissing Appeal

The motion of appellee for dismissal of the appeal in above cause coming on for hearing and presented by Mr. Phillip A. Robbins, counsel for the appellee and there being no appearance in open Court on behalf of appellant and submitted on papers in opposition thereto, IT IS ORDERED that the motion to dismiss be, and hereby is granted, that the appeal be and hereby is dismissed and that a judgment of dismissal be filed and entered accordingly.

Judgment

Appeal from the United States District Court for the District of Arizona.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and on motion of Appellees to dismiss the appeal herein, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the motion to dismiss be, and hereby is granted, and that the appeal in this cause be, and hereby is dismissed.

(ENDORSED) Judgment

Filed and entered: May 9, 1960.

FRANK H. SCHMID, Clerk